

No. 09-0005

IN THE SUPREME COURT OF TEXAS

Transcontinental Insurance Company,

Petitioner

v.

Joyce Crump,

Respondent

On Petition for Review from the Fourteenth Court of Appeals of Houston,
Transcontinental Insurance Company v. Joyce Crump, Cause No. 14-06-00905-CV

Office of Injured Employee Counsel's *Amicus Curiae* Brief

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TO THE HONORABLE TEXAS SUPREME COURT:

The Office of Injured Employee Counsel (OIEC) submits this brief pursuant to Rule 11 of the Texas Rules of Appellate Procedure as *amicus curiae* and would respectfully show the Court as follows:

INTEREST OF AMICUS CURIAE

OIEC is the state agency charged with representing the interests of injured employees as a class as provided for in Texas Labor Code § 404.104(3). OIEC has

determined that the interests of injured employees as a class will be adversely affected if the Court of Appeals' decision is overturned.

OIEC supports the legal arguments and authorities presented by the Respondent as set forth in Respondent's Brief on the Merits on the producing cause and expert qualifications issues. OIEC takes no position on the attorney's fee issue. The purpose of this brief is not to expand upon those arguments and authorities, but rather to bring to this Court's attention additional considerations and consequences that will result if this Court overturns the decision of the Court of Appeals. OIEC's brief focuses on public policy considerations and on the adverse consequences of changing the legal and evidentiary burden applicable to injured employees to prove entitlement to Texas workers' compensation benefits.

OIEC respectfully requests the Court to affirm the decision of the Court of Appeals. Amicus is not aligned with any party to the underlying lawsuit. Amicus is a state agency; and as such, no fees have been or will be paid for the preparation of this brief.

ARGUMENT

Texas workers' compensation law has traditionally sought to strike a reasonable balance between the interests of employers and employees. Employers may provide

workers' compensation coverage for their employees and by doing so receive protection from liability claims due to employee injury. Employees receive coverage by giving up their common law right to pursue liability claims against their employers. Part of this bargain has been that while the potential benefits under workers' compensation are less than the potential benefits from a liability claim, there is a greater likelihood that these benefits will be paid. *Texas Workers' Compensation Com'n v. Garcia*, 893 S.W.2d 504, 521 (Tex. 1995). This is the basis of the description of workers' compensation as "limited benefits, liberally provided." This doctrine has often been interpreted to mean that the workers' compensation law should be liberally construed to affect its purpose of compensating injured employees. *Albertson's Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999).

Part of the liberal interpretation of the workers' compensation law is that a pre-existing condition is not a reason to deny a workers' compensation claim, unless the pre-existing condition is proven to be the sole cause of the claimed injury. *Texas Employers' Insurance Association v. Page*, 553 S.W. 2d 98, 100 (Tex. 1977). That is, for the purposes of workers' compensation, the employer takes the injured employee as the employer finds the injured employee. *Garcia v. Texas Indemnity Co.*, 209 S.W.2d 333 (Tex. 1948). The fact that an injured employee has a bodily infirmity that makes the work-related injury more significant does not preclude recovery of workers' compensation benefits except in those instances where the insurance carrier accepts and satisfies a sole cause burden.

The doctrines of liberal interpretation and sole cause were central to the decision of the Court of Appeals in the present case in holding that the trial court properly defined producing cause. Rejection of these doctrines and a desire to place a higher burden on injured employees to prove that the work-related injury is a substantial cause of the death seem to underlie the Petitioner's argument that the Court of Appeals should be reversed based upon the producing cause jury instruction. Indeed the Petitioner argues that this Court should impose the definition of producing cause adopted in *Ford Motor Co. v. Ledesma*, 243 S.W. 32 (Tex. 2007) in workers' compensation cases. The Court of Appeals rejected this argument in the present case when it stated as follows:

After the parties submitted their briefs in this matter, the Texas Supreme Court decided *Ford Motor Co. v. Ledesma*, 242 S.W. 3d 32 (Tex. 2007). In *Ledesma*, the Supreme Court determined the correct definition of "producing cause" in a products liability action as being a substantial factor in bringing about an injury, and without which the injury would not have occurred. *Ledesma*, 242 S.W.3d at 46. We find *Ledesma* distinguishable and inapplicable to this appeal because it is a products liability case which requires the cause to be a substantial factor of the event in issue, a requirement absent from a workers' compensation case.

Trasncontinental Ins. Co. v. Crump, 274 S.W.3d 86, 100 n. 13 (Tex. App. – Houston [14th Dist.], 2008, pet. granted).

Applying the definition of producing cause found in *Ledesma* to Texas workers' compensation cases would constitute a major change in how the interests of employers and employees have been balanced in Texas workers' compensation law and reverse historical precedents that go back to some of the earliest workers' compensation jurisprudence. It would relieve the carrier of its burden to prove that a pre-existing

condition is the sole cause of a claimed injury in order to defeat recovery, and would represent a major step toward making the existence of pre-existing condition a defense in a workers' compensation claim—upending the doctrine that an employer takes an employee as the employer finds him, and significantly undermining the doctrine of liberal interpretation.

Ledesma was a products liability case and should, in no way, be precedent for a change of the definition of “producing cause” in a workers' compensation case. First of all, the court in *Ledesma* recognized that the causation issue dealt with establishing the causal connection between the defect in question and the traumatic occurrence. That element of the case is inherent in a strict liability products liability case and is not an issue in a no-fault workers' compensation case. The causal connection at issue in workers' compensation relates only to whether the traumatic occurrence was *a* cause of the death or disability of the claimant.

It has become a common defense for carriers to dispute and deny claims for the reason that the condition in question is an ordinary disease of life. It is an indisputable fact that pre-existing conditions are a part of life and such conditions may play some, or even a significant, part in the death or disability of the claimant. It is for that specific reason that the courts have historically required that insurance carriers satisfy the burden of proving that the pre-existing condition is the sole cause of the claimed death or disability. Should an older person be denied a recovery because of the brittleness of his

bones or the arthritis that is caused by a lifetime of hard work? In *Flores v. Employees Ret. Sys. of Tex.*, 74 S.W.3d 532, 549 (Tex. App.- Austin 2002, pet. denied) the Austin Court of Appeals clearly articulated the historical justification for requiring the insurance carrier to satisfy the sole cause burden by stating:

The focus of proximate cause is to determine whether there is an “unbroken causal connection between the injury and the disability or death.” [Citation omitted.] A cause is a proximate cause if, in a natural and continuous sequence it produces the harm, and if without it the harm would not have occurred. [Citation omitted.] As the term “proximate cause” is used in negligence law, the cause must also be a substantial factor in bringing about the harm. [Citation omitted.] Because of the liberal interpretation of the Workers’ Compensation Act, however, a workplace injury or disease is considered to be a producing cause even if it is not a substantial factor in bringing about the disability. That is, the workplace injury need not be the primary cause of the employee’s disability; rather, as long as the occupational injury is *a* producing cause of the disability there is a sufficient causal link under the workers’ compensation scheme. [Citation omitted.] An unrelated condition or injury may be the primary factor in causing the employee’s disability, but unless the carrier can prove that such unrelated factor was the *sole cause* of the employee’s incapacity, an employee remains eligible for workers’ compensation benefits. [Citation omitted.]¹

The Petitioner’s argument that there was no medical evidence to support the jury’s verdict poses an equally grave obstacle to the rights of injured employees in Texas. If the substantial medical evidence in this case constitutes no evidence of a compensable injury, it is unlikely that many of the injured employees in Texas will be able to produce sufficient evidence to support a jury finding of injury.

¹ See also, *Liberty Mut. Ins. Co. v. Burk*, 295 S.W.3d 771 (Tex. App.- Fort Worth 2009, no pet. h.) for a discussion of the difference in causation standards in negligence cases and workers’ compensation cases and the basis for the distinction.

Part of the problem with obtaining the level of medical evidence the Petitioner argues is necessary to prove a workers' compensation injury is that these are cases involving limited benefits. Often the only doctor available to testify for an injured employee is a treating doctor, who has made a career of treating patients, rather than a career of testifying for insurance carriers in support of medical or causation denials. Insurance carriers have the financial resources to gain access to doctors who make a career of reviewing medical literature in preparation to testify in court. To preclude the testimony of a treating doctor while admitting the testimony of a doctor who has made a career of testifying for insurance carriers, is surely a miscarriage of justice.

The Court of Appeals in this case recognized that when judging the clinical medical evidence offered by a treating doctor, rigid adherence to the Daubert/Robinson/Jordan standards is impractical. The Court of Appeals looked to the decision in *Coastal Tankships, U.S.A., Inc. v. Anderson*, 87 S.W.3d 591, 599-601 (Tex. App.-Houston [1st Dist], 2002, pet. denied), where the court applied a test to determine the reliability of clinical medical evidence that acknowledged the importance of experience and training, as opposed to scientific method, in evaluating the reliability of such evidence. Specifically, the *Anderson* court determined that the evidence in that case, which was based on a differential diagnosis, was reliable. Applying the same analysis in the present case, the Court of Appeals correctly determined that Dr. Daller's opinion was reliable and admissible.

A review of Dr. Daller's testimony illustrates why the Daubert/Robinson/Jordan standard cannot be meaningfully applied to determine the reliability of his clinical opinion. Dr. Daller explained that to scientifically test his opinion, he would have to injure a patient to see if the patient developed histoplasmosis and eventually died, an experiment that he obviously could not perform. 4 CR 543-44. To impose a reliability analysis on clinical medical evidence that is nearly impossible to meet would effectively eliminate the only available medical evidence that an injured employee could present in most cases. Such an evidentiary standard would not merely effectively close the courthouse doors to many injured employees, but would lock those doors.

OIEC respectfully requests that this Court not upset the balance between the interests of employers and employees by adopting the stringent legal and evidentiary standards in workers' compensation cases for which the Petitioner argues. Instead, OIEC respectfully requests that the Court maintain that balance by affirming the decision of the Court of Appeals.

PRAYER

For the reasons explained herein, OIEC respectfully requests the Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Office of Injured Employee Counsel's Amicus Curiae Brief* has been sent by U.S. certified mail, return receipt requested, on this 7th day of January 2010, to the following:

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CERTIFICATE OF COMPLIANCE

At the request of the Court, I certify that this submitted computer disc/CD (or email attachment) complies with the following requests of the Court:

1. This filing is labeled with or accompanied by the following information:
 - a. Case Name: ***Transcontinental Insurance Company v. Joyce Crump***
 - b. The Docket Number: **09-0005**
 - c. The Type of Brief: **Amicus Curiae Brief of the Office of Injured Employee Counsel**
 - d. The word processing software and version used to prepare the filing:
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Date